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In the Supreme Court
OF THE
United States

October Term, 1944

No. [redacted] [redacted] 10

LUMBER PRODUCTS ASSOCIATION INC., et al.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Subject Index

Table of Authorities Cited

Cases

Codes

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to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Now come Boorman Lumber Company, Hogan Lumber Company, Loop Lumber & Mill Company, Smith Lumber Company, Tilden Lumber Company, E. K. Wood Lumber Company, Zenith Mill & Lumber Com-

pany, Eureka Mill & Lumber Co., Wood Products Inc., D. N. Edwards, Nels E. Nelson, Robert W. Shannon and Andrew Nelson, and respectfully pray that a writ of certiorari may be granted, and issued, directing the Circuit Court of Appeals for the Ninth Circuit to certify to this Honorable Court, for review and determination, the judgment of said Ninth Circuit Court of Appeals in this case.

THE OPINION BELOW.

The opinion of the Ninth Circuit Court of Appeals rendered in this case appears at pages 1674 et seq. of the transcript here.

JURISDICTION.

The judgment of the Circuit Court of Appeals is printed at page 1697 of the transcript. The order of said Circuit Court of Appeals, denying the petition for rehearing, which was filed therein by these petitioners, was entered on October 14, 1944, and is printed at page 1698 of the transcript; and the order of said Court staying issuance of its mandate until after this Honorable Court disposes of the petition for writ of certiorari, if such petition be filed on or before November 17, 1944, is printed at page 1699 of the transcript herein.

The jurisdiction of this Honorable Court is invoked under Section 240 of the Judicial Code, as amended. (28 USCA, Sec. 347.)

STATEMENT OF THE CASE.

On June 26, 1940, certain labor unions (herein sometimes referred to as "unions") and certain manufacturers, including these petitioners (sometimes referred to as "employers") were charged, by indictment, with an alleged conspiracy to restrain interstate commerce in millwork and patterned lumber; in alleged violation of Section 1 of the Sherman Anti-Trust Act.

The accusation against the defendants named in the indictment may be briefly stated and summarized as asserted in paragraph 28 of the indictment (Transcript p. 28), as follows: That in 1936, the defendant labor unions made certain wage demands on the defendant manufacturers; that the defendant manufacturers "acceded to those demands" and in pursuance thereof the defendants, on or about the 21st day of September, 1936, entered into a contract and agreement covering the wages to be paid to the members of defendant unions, in which said agreement it was further agreed that "no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by saw mills, mills or cabinet shops, or their distributors that do not conform to the rates of wage and working conditions of this agreement".

After alleging the aforesaid terms of said agreement, the indictment then alleged that by subsequent agreements and understandings, the defendants continued in full force and effect "the provisions of said agreement described in paragraph 28, subparagraph

(b) with reference to the restriction on millwork and patterned lumber, manufactured at lower rates than those then in force in the San Francisco Bay Area". (Transcript p. 29.)

After demurrers to the indictment (contending that no public offense is charged therein) had been overruled, but before trial, various of the employer defendants, including these petitioners, withdrew their pleas of not guilty, and entered pleas of *nolo contendere*.

The trial of the remaining defendants resulted in conviction. Thereafter judgment was imposed on all the defendants, including these petitioners.

On appeal to the Circuit Court of Appeals for the Ninth Circuit, that Court affirmed the judgment of the trial Court (except as to two individual defendants); the opinion of the Court is printed at page 1674 et seq. of the transcript herein.

THE QUESTIONS PRESENTED.

The questions presented for consideration and review here, are as follows:

First: Whether a labor contract entered into as a result of the demands or coercion of organized labor, which seeks to protect the contracting labor unions by providing for certain wage scales, and that the employer shall not purchase, and his employees (the union members) shall not do any work upon "any material or article that has had any operation per-

formed on same by saw mills, mills, or cabinet shops, or their distributors, that do not conform to the rates of wage and working conditions of this agreement" is not within the legitimate objectives of organized labor.

Second: Whether, if as a result of such agreement, any restraint, direct or indirect, results as to importations into the state, of materials produced at scales of wages, or under working conditions less favorable to organized labor than the wages and working conditions specified in the agreement, the agreement is thereby rendered unlawful under the Sherman Act, and the act of the labor unions on the one side in demanding and obtaining, and of the employers on the other side in "acceding to" and granting such demands, consfitutes a crime and public offense under the Sherman Act.

Third: Whether the Ninth Circuit Court of Appeals erred in ruling and holding that the indictment involved here, charging the acts specified in paragraph First, above, states a crime and public offense.

REASONS FOR GRANTING THE WRIT.

The decision of the Ninth Circuit Court of Appeals, rendered in this case (Transcript p. 1674) is in direct and irreconcilable conflict with the decision of the Second Circuit Court of Appeals, rendered on October 12, 1944, on a similar state of facts, in the case of *Allen-Bradley Co. v. Local Union No. 3 Inter-*

national Brotherhood of Electrical Workers. Said Allen-Bradley decision is not yet reported in Federal Reporter, so for the convenience of this Court, said decision is reprinted in the appendix hereto.

Furthermore, the decision of the Ninth Circuit Court of Appeals, in the case at bar, is in direct conflict with the law as repeatedly announced and followed by this Honorable Supreme Court in *United States v. Hutcheson*, 312 U.S. 219; *Apex Hosiery Co. v. Leader*, 310 U.S. 469; *United States v. Building & Construction Trades Council*, 313 U.S. 539; *United States v. Brotherhood of Carpenters*, 313 U.S. 539, and *United States v. International Hod Carriers*, 313 U.S. 539.

CONCLUSION.

It is, therefore, respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
November 10, 1944.

Respectfully submitted,
MORGAN J. DOYLE,
Attorney for Certain Petitioners.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

These petitioners contend that the indictment involved here failed and fails to state a public offense. We are concerned here solely with Count One of the indictment, Count Two thereof having been dismissed in the District Court. (Transcript p. 109.)

In Count One the Government has attempted to charge all the defendants (labor unions and employers) with a violation of the provisions of the Sherman Act. The acts of the defendants which the indictment alleges as constituting a public offense con-

sist of the making of a labor agreement between the labor unions on the one side and the employers on the other. The indictment, after alleging that the labor unions made certain demands upon the employers, to which the employers "acceded", then describes the agreement which was entered into, and which the Government contends is unlawful, in the following language (Transcript pp. 28-29):

> (b) Pursuant to said understanding set out in paragraph 28, subparagraph (a), the defendants, on or about the 21st day of September, 1936, entered into a contract and agreement covering the wages to be paid to the members of defendant unions, in which said agreement it was further agreed that: "no material will be purchased from, and no work will be done on any material or article which has had any operation performed on same by Saw mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this agreement" (except certain named items);
>
> (c) The defendants have continued, in full force and effect, by subsequent agreements and understandings, the provisions of said agreement described in paragraph 28, subparagraph (b) with reference to the restriction on millwork and patterned lumber manufactured at lower wage rates than those then in force in the San Francisco Bay Area.

It is not charged that the manufacturers (employers) conspired between or among *themselves;* but rather that they, collectively and as a unit, conspired with the unions, as a unit, by "acceding" to the labor

union demands, and entering into a labor contract covering the said matters demanded and "acceded" to.

It is clear from the allegations of paragraph 28 of the indictment that a "labor controversy" existed; and that the defendant unions had made their demands. It is also alleged that the defendant employers "acceded" to those union demands in a written contract dated September 21, 1936, which imposed upon the employers the duty (1) to pay the scale of wages specified therein, and (2) to refrain from purchasing, or requiring any of the union members to work upon "Any material or article that has had any operation performed on same by saw mills, mills or cabinet shops, or their distributors that do not conform to the rates of wage and working conditions of this agreement."

It is clear that those were the demands made by the unions, to which the employers "acceded."

We think it clear beyond any question, that those labor union demands were, and still are, within the legitimate objectives of organized labor.

Apex Hosiery Co. v. Leader, 310 U.S. 469 at 503.

Consequently, those demands of the unions, being within the legitimate objectives of organized labor, and being therefore lawful and proper demands, the unions had a perfect legal right to make them and to insist upon them; * * * and if necessary to force the acceptance of those demands upon the employers. The employers in "acceding" to those demands merely

acknowledged the rights of the unions, submitted to those rights, and agreed to conduct themselves and their businesses in conformity with those union rights and objectives.

It is elementary that whenever and wherever a legal right exists in one party, a corresponding legal duty is imposed upon another. Here, the demands made by the unions upon the employers were clearly within the legitimate objectives of organized labor, and consequently the unions had a perfect legal right not merely to make, but as well to obtain, receive and enjoy the fruits of their rights as demanded; and that being so, there was forthwith imposed upon the employers, a definite legal right, if not a duty, to acknowledge and "accede" to those union demands. Accordingly, when the employers acknowledged and "acceded" to those union demands, by signing the contract in question, those employers did nothing more nor less than to exercise a legal right, if not a duty, to acknowledge and "accede" to legitimate demands of organized labor.

Certainly it cannot be that under our, or any, system of laws, the exercise of a legal right, or the performance of a legal duty, by any person, whether employer, employee or otherwise, shall constitute a crime.

Nor can it be that the lawful demands of organized labor become unlawful or criminal, if and when they are granted or "acceded to" by the employer.

Nor can it be that a labor contract, wherein the lawful demands of organized labor are met, and which

is therefore lawful, shall become unlawful and criminal, if perchance the burdens (wages and otherwise) imposed upon the employer by the contract shall ultimately, in some manner or other, operate to his advantage. The theory and philosophy of the entire body of labor laws, as presently constituted, is, and should be, that the recognition of the lawful demands of organized labor shall result in ultimate benefits alike to employees, employers and the nation at large. The theory advanced in the opinion of the Circuit Court of Appeals would seem to be that if the sole ultimate effect of a labor contract is to hurt and injure the employer, then the contract is valid; but if any benefits should accrue to the employer, then the contract becomes unlawful and criminal in character. That theory, if adopted in this country, would necessarily spell "finis" to the entire labor movement.

For the foregoing reasons, all of which will be found to be amplified in the petitions and briefs filed, or to be filed herein by labor union petitioners, these petitioners pray that a writ of certiorari be issued herein, and that the judgment of the Ninth Circuit Court of Appeals be reversed.

Dated, San Francisco, California,
November 10, 1944.

Respectfully submitted;
MORGAN J. DOYLE,
Attorney for Certain Petitioners.

(Appendix Follows.)

Appendix

Allen Bradley Company, et al., Plaintiffs-Appellees, v. Local Union No. 3, International Brotherhood of Electrical Workers, et al., Defendants-Appellants.

United States Circuit Court of Appeals, Second Circuit. No. 339. October Term, 1943. October 12, 1944.

Appeal from the United States District Court, Southern District of New York. Reversed.

Clayton and Norris-LaGuardia Acts; Union Boycott of Out-of-State Manufacturers; Right of Unions to Use Labor Weapons in Labor Controversies Regardless of Injuries to Third Parties.—The Anti-Trust Act is not applicable to a labor controversy merely because others than the immediate parties to the controversy are injuriously affected as a result thereof. Where, as a result of labor disputes between local manufacturers engaged in a certain industry and a union dominating the entire industry in the local area, the union succeeds in obtaining for its members higher wages, shorter working hours, and improved working conditions, by combining with the local manufacturers to close the market in the local area to the products of manufacturers in other areas within and without the state, such other manufacturers, though suffering great injury, are not entitled to an injunction restraining the union's actions, notwithstanding that the local manufacturers actively participate in the boycott by the consummation of union agreements obligating them not to purchase the products of the other manufac-

turers, and that the stifling of competition results in greater profits for them. The privilege of the members of a union to agree among themselves to refuse to work upon products of the other manufacturers in order to improve their working conditions is for practical purposes an almost complete shield for the union's actions, since a union acting for the benefit of its members does not forfeit the statutory exemption from the Anti-Trust Law merely because it combines with non-labor groups.

Walter Gordon Merritt, New York, New York (McLanahan, Merritt & Ingraham, Burgess Osterhout, and Hyler Connell, all of New York, New York, on the brief), for Plaintiffs-Appellees.

Harold Stern, New York, New York (George Rosling and Saul Pearce, both of New York, New York, on the brief), for Defendants-Appellants.

Before SWAN, AUGUSTUS N. HAND and CLARK, Circuit Judges.

[*Recapitulation*]

Action by Allen Bradley Company and ten other companies manufacturing electrical equipment against Local Union No. 3, International Brotherhood of Electrical Workers, and six named persons individually and as officers or agents of the Union, for an injunction and a declaratory judgment of illegality of certain alleged union activities. From a judgment for the plaintiffs, 51 F. Supp. 36, upon report of a special master, 41 F. Supp. 727, the defendants appeal. Judgment reversed and action dismissed.

[*Nature of Proceeding*]

CLARK, C. J.: Defendants, Local Union No. 3 of the International Brotherhood of Electrical Workers, American Federation of Labor, and certain of its officers, appeal from an order of the district court enjoining various activities of the union and declaring them to be a conspiracy in restraint of trade in violation of the Sherman Antitrust Act, 15 U. S. C. A. § 1, *et seq.*, and laws amendatory thereof. The enjoined activities constitute in sum any and all actions on the part of the union which would tend to boycott from the New York City area market electrical equipment manufactured by the various plaintiffs.

[*Proceedings in Lower Court—Scope of Review Sought*]

Plaintiffs filed their complaint below in December, 1935. The following year most of the plaintiffs joined in a companion suit against the union, and additional defendants, for treble damages at law under the Sherman Act; and this has remained pending in the district court without trial. The parties agreed to refer the present action to a special master for determination of "all issues of law and fact," and it was so ordered. After two and one-half years of hearings, at which, as the master states, more than 400 witnesses were examined, some 1,700 exhibits were presented, and some 25,000 pages of testimony, adduced, he filed an opinion, October 2, 1941, in which he discussed the facts and the law, concluding that the plaintiffs should have judgment, and asked the parties to submit pro-

posed findings of fact and conclusions of law, 41 F. Supp. 727. The parties having complied, the master, on November 23, 1942, filed his final report, containing lengthy findings and conclusions, which, upon cross-petitions to confirm and dismiss, the court below confirmed with some limited alterations and additions to the findings, 51 F. Supp. 36. The final decree, covering 121 printed pages of the record, included these findings, 374 in number, with 26 conclusions of law, as well as the form of injunction to be issued and the declaratory judgment declaring "that the combination and conspiracy and the acts done and being done down to the date of the conclusion of the taking of testimony herein before the Special Master, in furtherance thereof, all as set forth in the findings of fact as made and adopted by the Court herein, are unlawful and contrary to" the Sherman Act. This appeal is taken upon only the findings and judgment, and hence does not seek any modification of the facts found.

[*Parties Involved*]

The eleven plaintiffs in the action are manufacturers of electrical equipment whose factories are located for the most part without the New York City area. Several operate under collective bargaining agreements with local unions in their localities. Local 3 is the powerful local for the five boroughs of New York City of the International Brotherhood of Electrical Workers, itself one of the most influential members of the American Federation of Labor. Local 3 possesses approximately 15,000 members, divided into numerous separate classifications. Charter A members, number-

ing around 7,000 consist generally of journeymen electricians engaged in the fabrication and installation of electrical equipment, while Charter B members, numbering around 8,000, are largely employees of local manufacturers producing electrical equipment. Sole voting power rests in Charter A members, and Charter A membership is entailed for sons and brothers of existing members. Prior to 1928, Local 3 was composed only of the present Charter A members; but the membership now covers virtually everyone working on or producing electrical equipment in any way within the area. Although there are other officers and an executive committee, the nerve center of the union rests in the office of the business manager, who, among other things, has the complete power to select which members shall fill existing job vacancies.

[*Facts Found*]

The acts constituting the alleged conspiracy in restraint of trade which resulted in the boycott of plaintiffs' products are all elements of an extensive campaign undertaken by Local 3 to organize the electrical industry in New York City. This occurred with the appointment in 1934 of a new business manager, Harry Van Arsdale, Jr., after the depression years of 1931 to 1934 had left building at a standstill in New York City and found the union with only a quarter of its members employed. Thereafter year by year, as the master reports, Van Arsdale fought for, and gradually obtained for the union members, a reduction in the number of hours of work per week at the basic rate

of compensation, as well as an increase in the rate of compensation. Meanwhile the membership of the union greatly increased, so that it was highly successful in unionizing and in obtaining closed-shop agreements in both the local manufacturing and the local contracting branches of the electrical equipment industry. The findings then show that "agreements and understandings" entered into by the three groups—manufacturers, contractors, and union—gave them a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs.

While the boycott as found ran the gamut of electrical equipment from highly complicated switchboards and control devices down to novelty lamp shades, the case of the modern switchboard is offered as typical. There are in New York City a number of companies manufacturing switchboards who, before these activities of Local 3, shared an open competitive market with many of plaintiffs. In return for a closed-shop agreement calling for higher wages and shorter hours for employees, however, Local 3 promised these local companies an exclusive market for switchboards within the city, so that they could name their own price to offset increased production costs. Local 3 carried out its promise with the help of the electrical contractors. It had already won closed-shop agreements from a vast majority of the latter through a series of strikes, threatened strikes, and sympathetic strikes by other unions in the building trade, which threatened to tie up all construction work in New York City. It now secured the further terms that union

members should work only on switchboards of local manufacture by union shops, and that the contractors should have the sole power to buy materials for any job, with a proviso as additional protection that only products bearing the union label would be utilized. Like the manufacturers, the contractors were not averse to the extra expense of union material and labor, when all competition was thus removed from the field.

The contractors, however, went so far as to organize a voluntary Code of Fair Competition, which stipulated that every contractor should file with the code committee (upon which two officials of the union sat) every bid made by him on any work authorized in New York City, that he must include in his bid 35% of the labor cost for overhead, 10% of the materials' cost for commission, and 6% of the total for management, with price cutting penalized by substantial fines. This code was a part of the union contract with several contractor associations in 1935, but it was disapproved by the International President of the I. B. E. W. and the record is not entirely clear whether thereafter it remained a part of the union contract until the contractors themselves gave it up in 1939. At any rate, it is found that the union filed no complaints under the code and did not share in the fines or itself take any action against a contractor or cause its members to refuse to stay in the employ of disciplined contractors.

In other fields, with respect to other items of electrical equipment, a similar situation was found to

prevail. Only when no local unionized manufacturer made an article was its use permitted, and in such cases, if at all feasible, it was required either that the article come from the manufacturer "knocked down," to be put together by union labor, or that the finished article be unwired and rewired upon receipt. For years it has been more economical for the manufacturer to wire at the factory such articles as lighting fixtures and control equipment; but the union required the wiring to be done by its own members on the job, even though, in the case of control equipment, the manufacturer had to complete the wiring before shipment for testing purposes. Curiously, a similar requirement was also in force with regard to some equipment manufactured by Local 3 members in closed Local 3 shops. Switchboards, for example, had to be "knocked down" at the factory and reassembled at the job.

[*Summary of Facts*]

All in all, the situation disclosed by the findings is that of an entire industry in a local area, quite dominated and closed to outsiders by a powerful union, whose members receive as a result exceedingly higher wages, shorter working hours, and improved working conditions, and whose co-partners—the local manufacturers and contractors—also gain by the greater profits achieved through the stifling of competition. This has been accomplished by the traditional labor weapons of refusal to work upon disfavored goods, with peaceful and non-violent persuasion, picketing, and black-

listing, and now the active participation of the local employers. The boycott, however, is virtually complete against manufacturers, such as plaintiffs, who have no working agreements with Local 3. It makes no difference that most of plaintiffs are located without the jurisdiction of Local 3 and hence could never bargain collectively with it in any event, or that some of plaintiffs are already working under harmonious agreements with other unions. Moreover, as must be expected in cases where a local area is thus closed to outside products, the persons injured will include not only the excluded manufacturers and rival unions, but also—at least initially and very likely continuously—the consuming public, which must pay higher rates (as, indeed, it must also for raising of wages and lowering of hours of work) and does not receive the benefits of improved machinery or methods of operation. Thus it appears that general electrical work and equipment are costly in New York City, and instances are cited where equipment of plaintiffs was turned down for local equipment with the union label at twice or three times the cost. Since the lowest bidder no longer gets city contracts, if it be not a union bid, the city has lost Federal grants, which were premised upon acceptance of the lowest bid. An outstanding example of the consequences from this type of economic warfare to third persons is that of one local manufacturer which has two price lists for its products, one for union use within the city at more than twice the price of the other for use without the jurisdiction.

[*Ambiguity Caused by Multiplicity of Words in Lower Court's Findings*]

This is only a brief, but, as we believe, a presently adequate, summary of the many pages of record devoted to a statement of the facts. The industry of counsel and of the special master is to be commended; but we are constrained to say that the very verbosity and superfluity of the findings have not aided decision as much as doubtless had been expected. We have had occasion to point out recently that findings, prepared after decision by winning counsel, even though accepted by the court, are not as helpful as the trier's own original views; and this is particularly true when the findings are lengthy and repetitious. *Matton Oil Transfer Corp. v. The Dynamic,* 2 Cir., 123 F. 2d 999, 1001; *United States v. Forness,* 2 Cir., 125 F. 2d 928, 942, certiorari denied *City of Salamanca v. United States,* 316 U. S. 694; *Petterson Lighterage & Towing Corp. v. New York Central R. Co.,* 2 Cir., 126 F. 2d 992, 906; cf. Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 1944, p. 59. Here there is an added difficulty in the incorporation of all the findings in the judgment and their inclusion by express statement in the declaration of invalidity and by implication in the prohibition of the injunction. Doubtless this was done to satisfy requirements that an injunctive order must set forth the reasons for its issuance and describe in reasonable detail the acts to be restrained, Federal Rule 65(d), continuing 28 U. S. C. A. § 383, cf. 29 U. S. C. A. § 109; but a multiplicity

of words is as little revealing as a dearth of words. Labor union officers and members are entitled to a more direct and succinct statement of the illegalities of which they are held guilty and which they must cease under penalties of fine and imprisonment. This basic requirement assumes the greater importance here because the course of decision below has left the case not free of ambiguity on a crucial feature. For, as we shall point out, recent decisions have conceded labor unions quite broad powers to refuse to work and to employ peaceful persuasion, but have left open the effect of combinations or conspiracies of unions with non-union elements, particularly for non-union objectives. Thus the nature and purpose of the conspiracies here may quite possibly be the crux of the case.

[*Element of Conspiracy with Non-Labor Groups—Change in Emphasis as Case Progressed*]

This ambiguity as to the importance here of the element of conspiracy with non-labor groups—as against other more traditional labor-union activities—apparently stems from a real change in emphasis as the case progressed. Indeed, such a change was but natural, if not necessary, because of the complete reversal of the controlling judicial precedents during the long pendency of this litigation. In the original complaint of 1935 the stress is on union power which has forced the contractors to employ only union labor and "through their [defendants'] said control over said electrical contractors" has coerced the latter not to purchase electrical equipment wired or assembled wholly or partly by non-union men outside the Metro-

politan Area. And the prayer for injunction—important because it is, except for limited additions hereinafter noted, the injunction ultimately granted—was against the inducing of persons not to work upon plaintiffs' products, with no direct prohibition of conspiring with non-union groups and indeed no reference to such groups unless possibly under the vague term "confederates." Significantly, no non-union coconspirator was joined as a party defendant and none has since been added. The expanded amended complaint of 1937 does set forth at considerable length allegations of contracts with the electrical contractors who, however, were said "to have been and now are, forced, compelled and coerced by Local 3 to enter into" these contracts for the conduct of their business in the Metropolitan Area and restricting their choice as to the manufacturers from whom they would make their purchases of electrical equipment. And the requested form of injunction remained as in the complaint. The master's opinion stressed the union's economic power, which had not merely obtained higher wages and shorter hours of labor, but had brought submission and then complaisant and active participation from the local employers. The voluminous findings filed in 1942 make much more of the conspiracy, or conspiracies; and several conclusory findings allege an intent to give the local manufacturers and contractors power to control the market and the market price. The injunction as granted, however, accepts, with slight and unimportant changes of wording, the original eight subparagraphs as prayed for in the complaint, and merely adds two more: a 9th against mak-

ing, carrying out, or seeking to secure the observance "of agreements or understanding with contractors, manufacturers, or others, restraining, hindering or preventing" the purchase or use of plaintiffs' electrical equipment on the ground that it was not made in New York City or worked on by members of Local 3 or was in competition with equipment made by manufacturers employing members of Local 3; and a 10th against "any action whatsoever" hindering the purchase or use of plaintiffs' equipment on the same grounds as stated in the 9th. The broad scope of the injunction is such as to reach peaceful attempts by the defendants—among whom are included the individual officers of the union—to induce any person (thus even a union member) not to deal with plaintiffs, while it is most doubtful if the unnamed "confederates" are reached at all. Cf. Federal Rule 65 (d), *supra*.

[*Acts Were Done for Benefit of Union Members*]

Nevertheless, on any judicious view of the case, we do not believe the motive or intent of defendants can be at all in doubt; and we are left only to appraise its legal validity and effect. That the union and its officers were acting wantonly, corruptly, or even benevolently for the mere benefit of their copartners, and were not at all times acting for what they conceived to be the self-interest of the union and its members, is nowhere asserted, but is negatived by the general import of all the findings and explicitly by several, of which Finding 361 is typical. That finding, after stating that the defendants and those acting in concert

with them were "in no way concerned with the working conditions, rates of wages or union affiliations of the employees in plaintiffs' factories outside the Metropolitan Area," continues:

"The ban on the plaintiffs' products is and has been imposed and maintained by the aforesaid combination of the defendants, the local union contractors and the local union manufacturers, solely because the plaintiffs do not, or because of their geographical location outside the Metropolitan Area cannot, employ members of Local No. 3 in their factories outside the Metropolitan Area."

In other words it was a make-work campaign for the benefit of union members.

[*Authorities Immunizing Union Activities from Prosecution Under Anti-Trust Act*]

For half a century and against strong popular, political, and legislative pressure, the courts struggled to resolve the anomaly of applying a statute forbidding combination in restraint of trade to a social organism which must depend on united effort for its existence and upon at least certain restraints of trade as a reason for its being. Finally, at long length the Supreme Court boldly announced what must be taken as an abandonment of the attempt. The case which most significantly marks this change is *United States v. Hutcheson*, 312 U. S. 219, 231, 236, where the majority of the Court through Mr. Justice Frankfurter made clear that the Sherman, Clayton, and Norris-LaGuardia Acts must be read together as "interlacing.

statutes" presenting "a harmonizing text of outlawry of labor conduct," and that "the Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act." Hence the test of lawful union activities in the famous Section 20 of the Clayton Act, 29 U. S. C. A. § 52—which had been held merely declaratory of existing law in decisions such as *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 16 A. L. R. 196—is now to be given full effect, contrary to the holdings of the earlier cases, as stating permissible union activities in any "labor dispute" within the broad definition of that term of the Norris-LaGuardia Act, 29 U. S. C. A. § 113, as applied in cases such as *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U. S. 91, and *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552. Hereafter, following the terms of these Acts, it can no longer be considered illegal for any person or persons, singly or in concert, to cease or refuse to perform any work or labor or peacefully to persuade any person to work or abstain from working; or to cease to patronize any party to such a dispute, or to recommend, advise, or persuade others by peaceful and lawful means so to do. 29 U. S. C. A. §§ 52, 104. And a labor dispute includes, *inter alia*, "any controversy concerning terms or conditions of employment * * * regardless of whether or not the disputants stand in the proximate relation of employer and employee"; and a case grows out of a labor dispute when it involves persons engaged "in the same industry, trade, craft, or occupation; or have direct or indirect interests therein,"

whether it is between employers and employees, or employers and employers, or employees and employees, or associations of each, or when it involves "any conflicting or competing interests" of persons "participating or interested" in the dispute. 29 U. S. C. A. § 113.

[*Doctrine of Hutcheson Case Reaffirmed by Subsequent Decisions of U. S. Supreme Court*]

That the Court is now settled in its present view of the inapplicability of the Sherman Act even to labor controversies whose most injurious effects may be to others than the immediate parties is made clear by later important and unanimous decisions. The *Hutcheson* case itself immunized against prosecution under the Act a strike and boycott against a brewery company arising out of a jurisdictional dispute between two unions as to building construction work being done for it and for its adjoining tenant. Shortly thereafter the Court affirmed dismissals of other indictments, in *per curiam* opinions which merely cited the *Hutcheson* case. *U. S. v. Building & Construction Trades Council*, 313 U. S. 539; *U. S. v. United Brotherhood of Carpenters & Joiners*, 313 U. S. 539; *U. S. v. International Hod Carriers', etc., Council*, 313 U. S. 539, affirming *U. S. v. Carrozzo*, D. C. N. D. Ill., 37 F. Supp. 191. The latter case is particularly instructive because, as the opinion below shows, it involved a charge of conspiracy as against unions and their members to prevent the sale and use in the Chicago area of labor-saving machinery (truck mixers) or in the alternative to force the employment of the same num-

ber of workmen as before the use of the machinery. Further, the defendants were charged with having obtained "working agreements" with the Chicago contractors to this effect. Finally in the controlling case of *U. S. v. American Federation of Musicians*, 318 U. S. 741, the Court affirmed the dismissal in D. C. N. D. Ill., 47 F. Supp. 304, 305, of an action for an injunction brought by the United States against a nation-wide boycott by musicians and their union of recorded music supplanting their services; it did this merely on citation of the Norris-LaGuardia Act and the *New Negro Alliance* and *Milk Wagon Drivers' Union* cases, *supra*. In this case the union comprised "virtually all musicians in the nation who made music for hire"; and it was charged not only with conspiring to prevent the use of "canned music" by radio broadcasting stations, in juke boxes in various establishments, and in the home, but also with accomplishing its purposes through coercion exercised on the record-making companies by notifying them that the union members would not make musical records. Of course, the union was not interested in the working conditions of the employees of the record manufacturers or the radio stations, but was interested in providing work for its members; and it enforced its boycott in a *national*, not in a purely local, market.

[*Case at Bar Controlled by Authorities Because It Involves a Labor Dispute*]

These cases, as well as earlier ones, are too closely similar to the case at bar, indeed going beyond it in some aspects, to permit the broad adjudication of

illegality here and the injunction based upon it to stand. That this is a labor dispute within the statutory definition follows from the precedents. If a dispute as to the conditions of work between a union and employers still remains a labor dispute as to third persons interested therein or injured thereby, its complexion is hardly changed by a settlement—possibly only an armistice, not a treaty—between the original parties which hurts the third persons more than did the original controversy. *United States v. International Hod Carriers', etc., Council, supra; Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., supra,* 311 U. S. at page 99. The decision in *Columbia River Packers' Ass'n v. Hinton,* 315 U. S. 143, 147, strongly relied on by the plaintiffs and the court below, is not to the contrary; for there the controversy was between a processor of fish on the one hand, and independent fishermen and their association on the other. The Court emphasized that the defendants' desire was "to continue to operate as independent businessmen"; the dispute related "solely to the sale of fish," and hence was unlike those involved in earlier cases, where the employer-employee relationship was "the matrix of the controversy." The fact that some of the fishermen had a small number of employees who were also members of their association did not alter the essential nature of the controversy. So in *American Medical Ass'n v. United States,* 317 U. S. 519, 533-536, the professional association was interested solely in preventing the operation of a business conducted in corporate form by Group Health Association, Inc., not in the terms and conditions upon

which the latter employed its physicians. Here, however, the defendant union is admittedly a bona fide labor organization; and the "conditions" of the employment of its members by the local manufacturers and contractors are "the matrix of the controversy," indeed the very thing which causes the plaintiffs their injuries.

[*Union Members' Privilege to Refuse to Work Upon Manufacturers' Products*]

It seems clear, therefore, that the union members may refuse to work upon the plaintiffs' products; and, in view of the position of economic power which the union has now attained, that privilege is for practical purposes an almost complete shield for the defendants' acts which are most injurious to the plaintiffs. For all the other acts charged against the defendants may be barred; and yet if the union can hold its ranks together and keep its members from working upon plaintiffs' products, the Metropolitan Area will still be closed to them. The injunction does not purport to interfere with that privilege directly, though it comes close to doing so in the provisions, clearly too broad, which forbid the union officers from inducing anyone, even members, from thus doing what it and they may legally do. Moreover, peaceful persuasion, even of others, is clearly within the now applicable statutory terms. Indeed, the injunction is so far contrary to the statute that its mandate might well have been stated in the converse of the terms of the Clayton Act, § 20, *viz.*, as restraining Local 3 and its officers "from terminating any relation of employment, or from ceas-

ing to perform any work or labor * * * or from ceasing to patronize * * * any party to such labor dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do." 29 U. S. C. A. § 52, *supra*. And the vague scope of the declaratory judgment is even more indefinitely inclusive, in terms reaching all the activities of the defendants set forth in the findings.

[*Effort to Reframe Injunction Would Be Vain and Useless*]

If the present judgment and injunction must therefore fall, should they be reframed to reach only the asserted conspiracies with the local manufacturers and contractors? Such a result would obviously call for the most discriminating draftsmanship for the injunction, to make quite clear what was still permissible, to avoid all difficulties as to the extent of its reach in view of the failure to include the co-conspirators, and to define the objectionable union purpose and intent which, rather than the consequences of defendants' acts, now would become crucial, though proof adequate to justify enforcement by way of contempt proceedings would be hard to secure. But more important is the fact that such an injunction, though on its face so seemingly far-reaching, would after all be of limited effect. For under it, compliance to the extent of public dissolution of all the agreements would satisfy the legal formalities; but still if the union continued its boycott of plaintiffs' products, conditions would remain substantially as before. Such an inconclusive result can hardly fail to add to the bitterness between

the parties; one can easily foresee the almost impossible position of the Court in attempting fairly to pass upon the proceedings in contempt which would inevitably follow. We do not think the precedents are correctly interpreted to require an effort so vain and useless.

[*Union Does Not Necessarily Forfeit Its Immunity When It Combines With Non-Labor Groups*]

The doctrine that a union necessarily forfeits the benefits of its statutory exemption from the antitrust laws when it combines with non-labor groups, which has been asserted by some authorities, is rested upon a reading in the most extensive form possible of a limitation noted by Mr. Justice Frankfurter to the doctrine stated in the *Hutcheson* case, as follows:

"So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

And then to the word "groups" he dropped a footnote, which reads:

"*Cf. United States v. Brims*, 272 U. S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters." 312 U. S. at page 232.

The *Brims* case affirmed the conviction of union members in the Chicago area who refused to work on

non-union out-of-state mill work, with the result that an exclusive market was established for the local manufacturers; and the argument is that by these words of the Court the *Brims* case is still left in unabated force.

Now it is doubtful if Justice Frankfurter intended to define precisely just the extent of the limitation the Court had in mind. There was no necessity for him to do so at that time; and the matter had ramifications which the Court would not be likely to dispose of cavalierly. Hence the excepting sentence doubtless should not be read with exacting literalness; but in view of the use which had been made of it, we should note that it is not a positive affirmation, but a statement of only restricted reach. If its converse is to be accepted as an affirmative, it is not that combinations with non-labor groups are taboo, but only that when a union no longer acts in its self-interest and does so combine, then the licit and the illicit may have to be determined by a judgment as to the rightness or wrongness, etc., of the union end or purpose. Such a truism would seem still of undoubted validity; for the *Hutcheson* case did not purport to remove all rulings whatsoever upon labor activities. Thus, acts of violence are not protected by the statutes; nor, in any sound view, should labor union activities be usable merely as a blind or cloak for illegality. Thus, in *Albrecht v. Kinsella*, 7 Cir., 119 F. 2d 1003, 1004, 1005, the Court said:

"Labor unions as such were here involved only in name—and the name of labor was being used as a shield or blind behind which a venal group was hiding

and at the same time levying tribute upon industry, business, and home builders. * * * When officials of the labor union step outside their union labor fields and act as highway men, levying tribute on those who wish to build homes or other buildings, acting for their individual gain, the immunity granted to labor unions under the amendment to the Sherman Act does not extend to them."

And the Court went on to say:

"The test is whether the activity complained of is one promotive of, and within the scope of, the legitimate objects of a labor union or whether the union is being misused by those holding official position or positions of trust therein, who, conspiring for their private and their personal profit, are using the union name to obtain immunity from Sherman Act prosecutions and at the same time shield their misconduct behind an organization whose fair name and activities are likely to mislead a court or jury as well as the public."

It seems to us that this is the distinction the Supreme Court had in mind in its reference to the *Brims* case, and that the latter cannot now be held as broadly applicable as perhaps it was originally. As one commentator puts it, the *Brims* case "should be deflated to its position as one of a line of cases uncritically condemning refusal to work on non-union products delivered in interstate commerce"—a position no longer tenable in the form stated—and that "when the union is permitted to act alone, an agreement with employers should not automatically add the condemna-

ble virus." Tunks, *A New Federal Charter for Trade Unionism,* 41 Col. L. Rev. 969, 1012. This distinction seems to us the logical deduction to be made from the present state of Supreme Court decisions, and to be consistent with the statutes upon which the Court relies, and which do not in terms exclude business-labor combinations, but, as we have seen, do extend the inclusive labor dispute to include employment interests not themselves primarily engaged in a controversy as to terms and conditions of employment. On this basis it would follow that here the activities which cannot be forbidden to Local 3 acting by itself are not to be interdicted because other groups join with them to the same end.

[*Consequences of Judicial Non-Interference*]

That the present state of the authorities is such as to leave the harshness of the economic struggle to bear with unusual weight upon the consuming public has been the conclusion of commentators who have urged legislative action to check some of the abuses of power which exist. But the making of ground rules for business competition is difficult in any case, as shown by current discussions of such matters as patent monopolies and the issue of compulsory licensing to prevent the use of patents to retard new inventions; and the problems are immeasurably increased with the addition of the explosive elements of attempted regulation of organized labor. Indeed, advocates of legislative reform seem not agreed as to whether it should take the course of external controls of conduct towards third persons or internal regulation of union affairs.

The determination of such questions of policy is, of course, no proper function of the courts; we mention the matter to indicate that we are not unaware of the disturbing consequences to the parties involved of judicial non-interference which, however, in the light of experience seems likely to be less costly to stable social institutions than judicial attempts to resolve these problems without the aid of, if not contrary to, legislative direction.

[*Ruling*]

Judgment reversed and action dismissed.

[Dissenting Opinion]

SWAN, C. J., (dissenting): I do not read the Supreme Court cases as requiring us to hold that none of the conduct of the appellants, as found by the special master and the district court, can be deemed a violation of the anti-trust laws. The members of a labor union are privileged to agree among themselves upon a boycott, although the effect of it may be to restrain interstate commerce, when the purpose of their boycott is to make work for themselves, or improve working conditions or strengthen their union as against a competing union; but I do not think it has yet been held that they may agree with their employers to enforce a boycott for the very purpose of restraining commerce and increasing the price of articles manufactured or dealt in by their employers within a local market area. As I read the findings of fact the case at bar falls within the latter classification. Among the findings supporting this view the following may be quoted:

"353. The combination and conspiracy hereinbefore described was intended to and did give the local union manufacturers power to control the market price of their products as a result of their monopoly and was intended to and did give the union contractors exclusive purchasing rights to all electrical equipment for installation and contracts involving larger sums of money wherewith to add to their profits."

"359. The purpose of the defendants and those participating with them, in conducting the boycott is, in so far as is practicable, to exclude from the New York City market all electrical equipment unless it is manufactured or built by members of Local No. 3, employed by either local union manufacturers in the factory or by local union contractors on the job where the equipment is to be installed."

"366. All the acts of the defendants and those acting in concert with them were calculated and intended to prevent and destroy all interstate commerce in electrical equipment of such kinds as can be and are manufactured by local union manufacturers or built on the job by local union contractors in order thereby to secure a monopoly for the members of Local No. 3 and for their employers, the union electrical contractors and the union electrical manufacturers, of the work of manufacturing in whole or in part such types of electrical equipment to be used in the City of New York."

"368. A desire or intention by the conspirators to bring about any modification of the standards or terms of wages, hours, or working conditions, or employment

relations maintained by the plaintiffs, or any of them, in any of their factories outside the Metropolitan Area, did not in any way motivate the conspirators in boycotting the plaintiffs' products."

In my opinion the facts found by the trial court make applicable the principle of *United States v. Brims*, 272 U. S. 549, involving a conspiracy of mill work manufacturers, building contractors and a carpenters' union. Neither the Clayton Act nor the Norris-LaGuardia Act has rendered that case obsolete, as recent opinions of the Supreme Court plainly show. See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 501; *United States v. Hutcheson*, 312 U. S. 219, 232. The ninth circuit has just applied the rule of *United States v. Brims* to facts very similar to those of the case at bar. *Lumber Products Assn. v. United States*, decided August 23, 1944. I think that we should likewise apply it. Until the contrary shall be authoritatively determined, I am unwilling to believe that the Congressional legislation exempting labor unions from injunctions was intended to go so far as to permit employers and employees to combine to do what neither the City of New York by municipal ordinance nor the State of New York by legislative fiat could lawfully do, namely, exclude manufactured articles from the local market merely because they were manufactured outside the state. I agree with my colleagues that the injunction was granted in terms too broad, but I cannot agree that no injunction whatever is permissible or that the prayer for a declaratory judgment should be denied. I therefore dissent from dismissal of the complaint.